

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STACY MCCAIN, ADMINSTRATRIX OF THE	:	CIVIL ACTION
ESTATE OF SHIRLEY LILIAN MCCAIN,	:	
DECEASED	:	
	:	
v.	:	
	:	
BEVERLY HEALTH AND	:	
REHABILITATION SERVICES, INC.,	:	
T/A PHOENIXVILLE MANOR, <i>et al.</i>	:	No. 02-657

MEMORANDUM

Ludwig, J.

July 15, 2002

Defendant Beverly Health and Rehabilitation Services, Inc., t/a Phoenixville Manor, a nursing facility located in Chester County, Pennsylvania, moves to dismiss paragraphs 51, 60(g), 61, 62 and 63 of the amended complaint and to strike the claim for punitive damages.<sup>1</sup> Fed. R. Civ. P. 12(b)(6).<sup>2</sup> Jurisdiction is diversity. 28 U.S.C. § 1332. The motion will be denied.

This action, based on negligence, is for Wrongful Death Act and Survival Act benefits. Plaintiff's decedent, Shirley Lilian McCain, is alleged to have died from pressure sores developed while a resident at Phoenixville Manor.

1. Negligence *per se*: Paragraphs 60(g), 61, 62 and 63 - motion denied.

The issue is whether federal and state statutes, which plaintiff concedes do not

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<sup>1</sup> On May 14, 2002, a prior Rule 12 (b)(6) motion was granted, with leave to amend the complaint.

<sup>2</sup> In considering a Rule 12(b)(6) motion, all material fact allegations in the complaint are accepted as true and viewed in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of circumstances that would entitle relief. Brown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001).

provide private rights of action can be utilized to establish defendant's negligence *per se*.<sup>3</sup> Some years ago, our court ruled in the negative on this issue in Chalfin v. Beverly Enterprises, Inc., 745 F. Supp. 1117 (E.D.Pa.1990) ("Chalfin II"), an action for compensatory and punitive damages alleging an improper discharge of a resident from another nursing facility operated by the same defendant. There, a plaintiff was determined not to be within the protected class covered by Title XIX of the Social Security Act, one of the statutes relied on here to prescribe an actionable tort duty. Id. at 1119-1120. § 288 of the Restatement of Torts 2d states:

The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively . . . to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public.

Chalfin II explained:

The federal government or Pennsylvania state agencies are empowered to correct breaches by health care providers. Thus, it is clear that Title XIX of the Social Security Act and the Pennsylvania Health Care Facilities Act are types of legislation that were not intended to create a tort duty between the health

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<sup>3</sup> § 286 of the Restatement of Torts 2d:

The Court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment of an administrative regulation whose purpose is found to be exclusively or in part,

- a. To protect a class of persons which includes the one whose interest is invaded, and
- b. to protect a particular interest which is invaded, and
- c. to protect that interest against the kind of harm which has resulted, and
- d. to protect that interest against the particular hazard from which the harm results.

Here, for the relevant standard of care, plaintiff refers to the Omnibus Budget Reconciliation Act (OBRA), Pub.L. 100-203, 101 Stat. 1330 (1987), the regulations enacting OBRA, 42 C.F.R. §§ 482, 483, and the Older Adult Protective Services Act (OAPSA), 35 P.S. Sections 10225.302, 10225.303, and 10225.309 and Pa. Code §§ 211.10, 211.11, and 211.12.

care facility and the patient. Accordingly, plaintiffs' request for reconsideration of Counts I-IV under a negligence per se theory of liability is denied. (Citations omitted).

Chalfin II at 1120.

However, a more expansive and more current view of § 288 was expressed in Sharp v. Artifex, 110 F. Supp. 2d 388, 391 (W.D.Pa. 1999), in which the absence of a private right of action was found not to be dispositive.

Courts in Pennsylvania have recognized that the “absence of a private cause of action in a statutory scheme is an indicator that the statute did not contemplate enforcement of an individual harm.” [citations omitted]. However, it is just an indicator or a factor to consider and “does not necessarily preclude [the statute's] use as the basis of a claim of negligence per se.” Fallowfield Development Corp. v. Strunk, CIV. A. No. 89-8644, 1990 WL 52745, at \*19 (E.D.Pa. April 23, 1990). A statute may still be used as the basis for a negligence per se claim when it is clear that, despite the absence of a private right of action, the policy of the statute will be furthered by such a claim because its purpose is to protect a particular group of individuals. See id.<sup>4</sup>

Here, plaintiff's decedent, as a nursing home resident, comes within the older person's protections intended by OBRA and OAPSA and the regulations set forth in 42 C.F.R. § 483.<sup>5</sup> Moreover, the statutes and regulations are directed, at least in part, to obviate the specific kind of harm which was alleged to have been sustained: “pressure

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<sup>4</sup>See also, Cecile Industries, Inc. v. United States, 793 F.2d 97, 99-100 (3d Cir. 1986) (to find negligence *per se*, the “intent of the statute [must be] at least in part, to protect the interest of the plaintiff individually, as opposed to the public.”)

<sup>5</sup> 35 P.S. § 10225.102 states: “It is the policy of the Commonwealth of Pennsylvania that older adults who lack the capacity to protect themselves are at imminent risk of abuse, neglect, exploitation or abandonment shall have access to and be provided with services to protect their health, safety and welfare.” Chalfin II found that: “The statutes in the case at bar are administrative in nature. They are not “safety” statutes where the negligence per se doctrine is traditionally applied.” (Citations omitted). Chalfin II at 1120. However, Title 28 of the Pennsylvania Code is entitled “Health and Safety.”

sores.” 28 Pa. Code § 211.10; see § 286 of the Restatement of Torts 2d. Given these considerations, which arise from the allegations in the complaint, the lack of a private cause of action is not enough to preclude the use of the relevant policies expressed in the statutes and regulations. The furtherance of those protective policies is a basis for delineating a nursing home’s tortious duty in these circumstances. Accordingly, the dismissal motion as to this point must be denied.

2. Punitive damages - motion denied.

In Pennsylvania, punitive damages require “willful or wanton conduct or reckless indifference to the rights of others.” 40 P.S. § 1301.812 - A(a). The complaint’s allegations are sufficient to meet this standard.<sup>6</sup>

An order accompanies this memorandum.

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Edmund V. Ludwig, J.

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<sup>6</sup> Among the allegations: defendant knew of plaintiff’s decedent’s “high risk” for developing pressure sores, *amd.* *complt.* at 16. Nonetheless, she was transported in an ill-fitting wheelchair that caused such sores, *id.* at 36-37, and no attempt was made to change the method of transportation, *id.* at 38.

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**ORDER**

AND NOW this 15<sup>th</sup> day of July, 2002, in accordance with the accompanying memorandum, defendant Beverly Health and Rehabilitation Services, Inc., t/a Phoenixville Manor's motion to dismiss is denied.

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Edmund V. Ludwig, J.